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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

Ada Anisia LOPEZ-AMARO,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals of the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In light of Landgraf v. USI Film Products, 114 S.Ct. 1483 (1994) and Rivers v. Roadway Express, Inc., 114 S.Ct. 1510 (1994), both reaffirming the strong presumption against retroactive application of the law, especially when such an application would increase a party's liability for past conduct and absent a clear, positive, and express prescription from Congress to the contrary -- should a respondent be found deportable from the United States under a law enacted in 1990 for a conviction that took place in 1983, when the law in effect at that time carried no such deportation consequences?

LIST OF PARTIES

The parties to the proceedings are:

Petitioner:

ADA ANISIA LOPEZ-AMARO.

Respondents:

UNITED STATES COURT OF APPEALS OF THE ELEVENTH CIRCUIT; UNITED STATES DEPARTMENT OF JUSTICE; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, BOARD OF IMMIGRATION APPEALS; IMMIGRATION AND NATURALIZATION SERVICE; DAVID L. MILHOLLAN, Board of Immigration Appeals; MICHAEL J. HEILMAN, Board of Immigration Appeals (dissenter); DONALD A. COUVILLON, ESQ., FRANCESCO ISGRO, ESQ., U.S. Department of Justice; RICHARD M. EVANS, KENNETH S. HUREWITZ, ESQ., ROBERTO MARTINEZ, ESQ., Immigration and Naturalization Service; ANNIE S. GARCY, Immigration Judge (ruling in favor of Petitioner);

and the

SOLICITOR GENERAL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, D.C. 20530.

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The decision below presents an important, unanswered question of federal law which has not been, but should be satisfactorily settled by the Supreme Court. The decision should be reviewed in light of the Supreme Court's holdings in Landgraf v. USI Film Products, 114 S.Ct. 1483 (1994) and Rivers v. Roadway Express, Inc. 114 S.Ct. 1510 (1994), both of which reaffirm the strong presumption against retroactive application of the law when such an application would increase a party's liability for past conduct, absent Congress's clear and positive expression that such a result was intended by the lawmaker.

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OPINIONS BELOW

The decision and order of the Immigration Judge, terminating deportation proceedings against Petitioner, is unreported. Case No. A 18 760 938, In Deportation Proceedings at Martin Correctional Institution, Indiantown, Florida, for the Office of the Immigration Judge, Miami, Florida (December 7, 1992). (App. C: C-i to C-xi.) The decision of the Board of Immigration Appeals, Falls Church, Virginia, reversing the Immigration Judge and ordering the Petitioner deported from the United States, is reported. Matter of Lopez-Amaro, Interim Dec. # 3202 (BIA, June 1, 1993). (App. B: B-i to B-xxiii.)

The decision, sought to be reviewed, in which the Eleventh Circuit of Appeals affirmed the decision of the Board of Immigration Appeals, is reported. Lopez-Amaro v. INS, ___ F.3d ___, No. 93-4694 (11th Cir. July 12, 1994). (App. A: A-i to A-xiv.)

STATEMENT OF JURISDICTION

This Court's jurisdiction to review a decision of the United States Court of Appeals for the Eleventh Circuit, affirming a deportation order against the Petitioner issued by the Board of Immigration Appeals, is invoked pursuant to 28 U.S.C. § 1254(1).

Respondents brought this action in administrative proceedings before the United States Department of Justice, Executive Office for Immigration Review, Office of the Immigration Judge, charging Petitioner with deportability for violation of 8 U.S.C. § 1251(a)(2)(C).

The Immigration Judge found that the statute had been enacted in 1990; that Petitioner's 1983 conviction in violation of sections 782.04 and 775.087 of the Florida Statutes, which Respondents claimed subjected her to deportation under said statute, by far antedated the statute's enactment; and that a

retroactive application of the deportation statute was uncalled for and would be contra legis. Based on these conclusions, the Immigration Judge granted Petitioner's Motion for Termination of deportation proceedings. (App. C at C-xi) Respondents appealed to the Board of Immigration Appeals.

The Board, in a split decision, reversed the Immigration Judge and ordered Petitioner deported from the United States to her native Cuba. (App. B at B-xvii.) Board member Michael J. Heilman filed a dissent. (App. B at B-xvii.) Petitioner thereupon sought review in the United States Court of Appeals of the Eleventh Circuit, pursuant to 8 U.S.C. § 1105(a). The Court of Appeals affirmed the decision of the Board. (App. A at A-xiv.). This Petition for a Writ of Certiorari is timely filed within 90 days of July 12, 1994, by October 11, 1994.

STATUTES INVOLVED

8 U.S.C. § 1251(a)(2)(C) provides:

> Any alien who at any time after entry is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying in violation of any law, any weapon, part, or accessory which is a firearm or destructive device... is deportable.

Section 782.04, Florida Statutes, provides:

> Murder.- (1)(a) The unlawful killing of a human being: (1) When perpetrated from a premeditated design to effect the death of the person killed or any human being... is murder in the first degree and constitutes a capital felony, punishable as provided in §775.082.

Section 775.087, Florida Statutes, provides:

> (1) Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and during the commission of such felony the defendant carries, displays, uses, threatens, or attempts to use any weaponor firearm, or during the commission of such felony the defendant commits an aggravated battery, the felony for which the person is charged shall be reclassified.

STATEMENT OF THE CASE

On December 8, 1983 Petitioner, a female native and citizen of Cuba and a lawful permanent resident of the United States since 1972, was convicted in the State of Florida of first-degree "murder with a pistol" for killing her abusive companion. She was sentenced to natural life in prison with a minimum mandatory 25 years before the possibility of parole. Four years into her prison time, the State Governor, acting upon a recommendation of the State Clemency Board, reduced her sentence to 10 years.

During Petitioner's 9th year of imprisonment, the Immigration and Naturalization Service (INS) brought deportation charges against her pursuant to 8 U.S.C. § 1251(a)(2)(C), for having used a firearm during the commission of a crime. (No deportation charges were ever filed on the

basis of the actual murder conviction.) The INS served her with the respective Order to Show Cause, namely, the document that initiates deportation proceedings, on June 17, 1991.[1]

A deportation hearing was held inside the Martin Correctional Institution at Indiantown, Florida, on March 16, 1992, with Petitioner represented at same by counsel of record. In her decision, issued on December 7, 1992, the Immigration Judge found that the amendments to the statute under which the deportation charge was brought against Petitioner had been enacted in 1990; that Petitioner's 1983 conviction in violation of sections 782.04 and

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[1]The date is significant insofar as it seemed to have been carefully chosen to take place after March 1, 1991. The INS withheld serving the Order to Show Cause until then because, had she been served before March 1, 1991, she could not have been charged under the new 8 U.S.C. § 1251(a)(2)(C) which, by its own terms, only applied to Orders to Show Cause served after March 1, 1991.

775.087 of the Florida Statutes, which INS claimed subjected her to deportation under the new statute, by far antedated the statute's enactment; and that a retroactive application of the deportation statute was uncalled for. The Immigration Judge then granted Petitioner's motion for termination of deportation proceedings. (App. C at C-xi.) Respondents appealed to the Board of Immigration Appeals.

On June 1, 1993, the Board of Immigration Appeals reversed the Immigration Judge, sustained Respondents' appeal and ordered Petitioner deported from the United States to Cuba. The Board, in one single paragraph of its 7-page decision, dismissed the retroactivity issue that constitutes the core of this Petition for Writ of Certiorari. The Board relied entirely for its decision on Matter of Chow, Interim Dec. # 3199 (BIA, April 13, 1993), reviewed later as Chow v.

INS, 12 F.3d 34 (5th Cir. 1993). Petioner here takes the position that Chow was incorrectly decided both at the Board and upon subsequent review by the federal Court of Appeals for the same reasons undergirding the instant Petition for Writ of Certiorari.

Petitioner sought review of the Board's decision before the United States Court of Appeals of the Eleventh Circuit, pursuant to 8 U.S.C. § 1105(a). The Court of Appeals affirmed the decision of the Board of Immigration Appeals, relative to the retroactivity issue, relying upon this Court's holding in Mulcahey v. Catalanotte, 353 U.S. 692, 77 S.Ct. 1025, 1 L.Ed.2d 1127 (1957).

The instant Petition for Writ of Certiorari seeks review of the decision of the United States Court of Appeals of the Eleventh Circuit, pursuant to 28 U.S.C. § 1254(1). In light of this Court's recent decisions in Landgraf v. USI Film Products, 114 S.Ct. 1483

(1994) and Rivers v. Roadway Express, Inc., 114 S.Ct. 1510 (1994), as well as its re-examination and reliance on Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) and Chew Heong v. United States, 112 U.S. 536 (1884), Petitioner respectfully moves this Court to review, re-examine, and withdraw from its 1957 holding in Mulcahey and its progeny, supra.

STATEMENT OF THE FACTS

Petitioner, Ada Anisia Lopez-Amaro, now 46 years of age, is a female native and citizen of Cuba who was paroled into the United States in 1972 and was adjusted in 1977 to lawful permanent resident status, effective May 14, 1972.[2]

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[2]Both the decision of the Board of Immigration Appeals (App. B at B-ii) and the decision of the Eleventh Circuit Court of Appeals (App. A at A-ii) misstate the effective date of her admission to lawful permanent status as April 1977. The correct

In 1980, Petitioner, then the mother of two children and divorced from her first-husband, entered into a romantic relationship with a young Cuban male who had arrived that same year from Cuba on the so-called "Mariel boatlift." After several incidents evincing the violent and abusive nature of the man, Petitioner fatally shot him with a firearm, stood trial, was convicted of "first-degree murder with a pistol," and was sentenced to natural life in prison, without parole for 25 years, later commuted to 10 years by the State Governor.

In 1993, during her 9th year of imprisonment, INS brought charges of deportability against her pursuant to 8 U.S.C. § 1251(a)(2)(C) for "using" a firearm during

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date is May 14, 1972. See, decision of the Immigration Judge (App. C at C-ii) and photostatic copy of her Alien Registration Card ("green card"), with date of admission encircled: 051472, App. E.

the commission of a crime. A straight deportability charge for murder (no doubt a crime of moral turpitude), would have been legally ineffective given that an alien who committed only one crime of moral turpitude not within five years of entry would not be deportable. 8 U.S.C. § 1251(a)((2)(A).

Conversely, murder is now defined as an "aggravated felony." 8 U.S.C. § 1101(a)(43). This statute was incorporated into the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq., by the Anti-Drug Abuse Act of 1988 (ADAA), Pub. L. No. 100-690, 102 Stat. 4181. Why did the INS then not charge Petitioner with deportability under 8 U.S.C. § 1251(a)(2)(A)(iii), as an aggravated felon?[3] Probably because INS preferred to circumvent the retroactivity issues that would originate

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[3]Any alien who is convicted of an aggravated felony at any time after entry is deportable. 8 U.S.C. § 1251(a)(2)(A)(iii).

in the fact that the "aggravated felony" definition was introduced by the ADAA as of November 18, 1988, and here would have had to be applied to a murder conviction handed down in 1983.

Coincidentally, the ADAA also amended an existing deportability section, namely, 8 U.S.C. § 1251(a)(14). In 1983 this statute sanctioned deportability only if the alien was convicted of possessing or carrying an automatic or semi-automatic firearm, such as a sawed-off shotgun or a machine gun. (The statute, dating back to the 1930's, was clearly aimed at curbing alien participation in gangsterism and organized crime prevalent during this era.)

On November 18, 1988, in keeping with the times, the ADAA amended the "sawed-off shotgun statute" to penalize the "carrying or possessing of any firearm..." in violation of law. Yet, most importantly, it restricted its

application to aliens convicted "on or after the enactment of the Act [November 18, 1988]." (App. A at A-iv).

On November 29, 1990, Congress once more amended the Act by way of the Immigration Act of 1990, renumbering all deportability sections and expanding the former 8 U.S.C. § 1251(a)(14) to include any alien convicted for "using" a firearm in violation of any law. 8 U.S.C. § 1251(a)(2)(C).

The Board of Immigration Appeals based its decision on (1) the purported retroactivity of all deportation statutes crafted in terms of convictions "at any time after entry" and (2) on the purported effect of a perenially re-enacted "Savings Provision," to wit, section 602(c) of the Immigration Act of 1990, which would purportedly prescribe automatic and never-ending retroactivity for all deportation grounds on the basis of the following,

somewhat cryptic language:

> (c) SAVINGS PROVISION.- Notwithstanding the amendments made by this section, any alien who was deportable because of a conviction (before the date of enactment of this Act) of an offense referred to in paragraph (15), (16), (17), or (18) of section 241(a) of the Immigration and Nationality Act, as in effect before the date of the enactment of this Act, shall remain so deportable. Except as otherwise specifically provided in such section and subsection (d), the provisions of such section, as amended by this section, shall apply to all aliens described in subsection (a) thereof notwithstanding that (1) any such alien entered the United States before the date of enactment of this Act, or (2) the facts, by reason of which an alien is described in such subsection, occurred before the date of enactment of this Act.
>
> (d) EFFECTIVE DATE.- The amendments made by this section, and by section 603(b) of this Act [infra], shall not apply to deportation proceedings for which notice has been provided to the alien before March 1, 1991.

The INS, the Board of Immigration Appeals, and the reviewing Court of Appeals all want to find retroactivity per secula

seculorum in the above-cited savings provision. (See, App. A at A-v.) The agencies and the Court of Appeals insist on equating "convictions" with the "facts"-language of the savings provision. The Court of Appeals opines that "[i]f the term fact does not include conviction then it is a meaningless term." (App. A at A-vii). Petitioner submits that, as it stands, the term "fact" is far from a "meaningless term" even if is not interpreted as "convictions." It is a term encompassing conduct, for which the alien very well could be prosecuted and convicted today or at a later date. Petitioner submits that the language used simply and forcefully rejects granting a blanket statute of limitations to past conduct that could lead to criminal prosecution. In sum, the fact that the alien entered the United States before the enactment of a particular statute penalizing criminal conduct of a specific sort, does not wash him

free of future deportation consequences if he or she is convicted at a later time. And the fact that he or she committed certain acts in the past, does not free him or her from being prosecuted at a later time, and suffering the deportation consequences that might accrue from the deportation laws in effect at the time of the conviction.

Had Congress meant "convictions" where it wrote "facts," it could have easily done so, especially in a subsection of a statute where it had used the term "convictions" in the same (long) paragraph. "Where Congress includes particular language in one section of a statute and omits in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." INS v. Cardoza Fonseca, 480 U.S. 421, 432 (1987). "Matters of doubt should be resolved in favor of the alien in deportation proceedings." Fong

Haw Tan v. Phelan, 333 U.S. 6 (1948).

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW PRESENTS AN IMPORTANT, UNANSWERED QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SATISFACTORILY SETTLED BY THE SUPREME COURT. THE DECISION SHOULD BE REVIEWED IN LIGHT OF THE SUPREME COURT'S HOLDINGS IN LANDGRAF V. USI FILM PRODUCTS, 114 S.CT. 1483 (1994) AND RIVERS V. ROADWAY EXPRESS, INC., 114 S.CT. 1510 (1994), BOTH OF WHICH REAFFIRM THE STRONG PRESUMPTION AGAINST RETROACTIVE APPLICATION OF THE LAW WHEN SUCH AN APPLICATION WOULD INCREASE A PARTY'S LIABILITY FOR PAST CONDUCT, ABSENT CONGRESS'S CLEAR AND POSITIVE EXPRESSION THAT SUCH A RESULT WAS INTENDED BY THE LAWMAKER.

A. The presumption against retroactivity.

Writing for the 8-1 majority in Landgraf, supra, Justice John Paul Stevens noted that "[t]he presumption against retroactive legislation is deeply rooted in our jurisprudence... Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress has made clear its intent."

Landgraf, slip op. at 20, 26.

In both Landgraf and Rivers, supra, the Court held that if Congress wants any new legislation to apply retroactively, it must say so explicitly. Justice Stevens set forth a test for determining whether a statute should apply retrospectively:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties wqith respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result. (Emphasis added.)

Landgraf, slip op. at 36.

In the case at bar, Petitioner used a

firearm (pistol) in the commission of a crime for which she was convicted in 1983. At the time, the corresponding "weapons deportation statute" restricted deportability to aliens possessing or carrying an automatic or semi-automatic firearm. 8 U.S.C. § 1251(a)(14) (1983). In 1988, Congress amended the statute and broadened its coverage to include convictions for carryying or possessing any firearm. At that time Congress provided that the statute would only apply to aliens convicted "on or after the date of enactment of the Act [November 18, 1988]."

In 1990, Congress amended the statute once more, at which time it amplified the coverage of the section to include, among other things, convictions for "using" any firearm. The statute was renumbered as section 241(a)(2)(C), 8 U.S.C. § 1251(a)(2)(C). This was the section under which the Petitioner was found deportable.

B. The meaning of "at any time after entry."

The Board of Immigration Appeals, as well as the reviewing Court of Appeals reads a broad, overall retroactive Congressional intent in this (and, presumably, in many or most of the other) subsections of 8 U.S.C. § 1251(a), the deportation statute. Petitioner submits that such reading is wrong. 8 U.S.C. § 1251(a) distinguishes between crimes "committed within five years after the date of entry" and crimes committed "at any time after entry." For example, 8 U.S.C. § 1251(a) prescribes as follows:

(2) CRIMINAL OFFENSES.-
(A) GENERAL CRIMES.-
(i) CRIMES OF MORAL TURPITUDE.- Any alien who--

> (I) is convicted of a crime involving moral turpitude committed within five years after the date of entry, and
> (II) either is sentenced to confinement or is confined therefor in a prison or correctional institution for one year

or longer,
is deportable. (Emphasis added.)

> (ii) MULTIPLE CRIMINAL CONVICTIONS. Any alien who <u>at any time after entry</u> is convicted of two or more crimes involving moral turpitude...

is deportable. (Emphasis added.)

Note here the clear <u>contradistinction</u> between crimes committed "within five years of entry" and those where conviction obtains "at any time after entry." Case in point is, precisely, that of the Petitioner. Having committed the acts that constitute murder (certainly the most egregious of all crimes of moral turpitude), why could the INS not charge her under 8 U.S.C. § 1251(a)(2)A)(i)? Simply because she committed only one such crime ever, and because she committed it <u>not within</u>, but <u>without</u> "five years after entry." Hence, the circuitous route chosen by INS, namely, to charge her under the "weapons deportation statute" which does not pose such a limitation but, instead, applies to convictions "at any

time after entry."

Yet, does that adverbial construction validate the application of the statute to convictions obtained not only "at any time after entry" but under any law or statute that was not even on the drawing board at the time of the conviction? In other words, do enactments of later laws, by the sole virtue of the "at any time after entry" phrasing, validly rebut the clear and strong presumption against punitive retroactivity of later laws?

Petitioner submits it does not. "At any time after entry" means exactly that (in contradistinction to, e.g., "within five years of entry"), but not, without Congress expressly saying so, "at any time after entry" even if the burdening law did not exist at such time.

C. Mulcahey and the § 602(c) Savings Provision.

Mulcahey v. Catalanotte, 353 U.S. 692, 77 S.Ct. 1025, 1 L.Ed.2d 1127 (1957), if taken to

its rigorous logical extremes, would stand for the proposition that all deportation statutes, no matter when enacted, and without specific effective dates, apply retroactively, ad infinitum. The Mulcahey court said,

> Section 241(a)(11) makes an alien deportable if he has "at any time" been convicted of illicit trafick in narcotic drugs. And section 241(d) makes section 241(a)(11), applicable to all aliens covered thereby "notwithstanding... that the facts... occurred prior to the date of enactment of the Act." It seems to us indisputable, therefore, that Congress was legislating retrospectively, as it may do, to cover offenses of the kind herein involved.

Mulcahey, at 694.

Section 241(d) of the Immigration Act of 1952 is identical to section 602(c) of the Immigration Act of 1990, supra. The reviewing Court of Appeals rejected Petitioner's contention that the term "facts" is far from synonymous with "convictions," and held instead that the term fact includes

convictions, or else it would be a "meaningless term."

Petitioner submits that the fact that Congress, in its perennial enactment and re-enactment of the section 602(c) Savings Clause, used and keeps using the term "facts" when it could clearly say "convictions" if it so wanted, is wise and deliberate. By employing the term "fact" and giving it a retroactive application, Congress does not foreclose punishment for a given crime just because the facts underlying the crime occurred any time ago. In other words, Congress would not legislate any form of statute of limitations on the facts that could underlie a conviction for a crime. But this does not necessarily sanction such a retroactivity for the conviction arising out of these facts. Facts are often nebulous, especially in terms of chronology or occurrence on a fixed date. Convictions, the

result of a public, recorded process, on the other hand, are precise, fixed, reliable events in time.

Laws, absent a clear expression to the contrary, are presumed to run from their enactment or from a date subsequent to their enactment, generally contained in the same law. Generally speaking, punitive laws always run prospectively; ameliorative laws soemtimes are given express retroactive effect. "Tacitly" or "impliedly" extrapolating a retroactive intent from silence as to its effective date, runs dead contrary to the presumption of prospectivity. That is what the Board of Immigration Appeals has done recently by interpreting punitive deportation laws retroactively, e.g., Matter of A--A--, Interim Dec. 3176 (BIA 1992).

CONCLUSION

The decision below conflicts with the clear and strong presumption against

retroactive application of the laws, provided that Congress has not explicitly ordered such retroactivity. The Board of Immigration Appeals and the United States Court of Appeals for the Eleventh Circuit have misread the statute and, in so doing, have thwarted the presumption clearly outlined by this Court in Landgraf and Rivers, supra. As a result, grave and manifest injustice is accruing to Petitioner, who has paid the price of her crime by long imprisonment and now is facing banishment from this country, where she has made her life and those of her U.S. born children. For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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APPENDIX A - JULY 12, 1994
ELEVENTH CIRCUIT ORDER AFFIRMING DECISION OF THE BOARD OF IMMIGRATION APPEALS

Ada Anisia LOPEZ-AMARO, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE

Respondent.

No. 93-4694

United States Court of Appeals,
Eleventh Circuit.

July 12, 1994.

Petition for review of an order of the Board of Immigration Appeals.

Before COX and CARNES, Circuit Judges, and WOOD*, Jr., Senior Circuit Judge.

HARLINGTON WOOD, Jr., Senior Circuit Judge:

The petitioner, Ada Anisia Lopez-Amaro, appeals from an Immigration Board of Appeals decision finding her to be deportable to her

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*Honorable Harlington Wood, Jr., Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

native Cuba. In 1983 a Florida court convicted the petitioner of "murder with a pistol." The Board determined that this was a conviction for a "firearms" offense; therefore, pursuant to section 241(a)(2)(C) of the Immigration and Nationality Act of 1990 she could be deported.

I.

The petitioner is a native and a citizen of Cuba. She was paroled into the United States in 1972 and became a permanent lawful resident in April of 1977. Six years later she used a pistol to kill her allegedly-abusive companion. On December 8, 1983 she was convicted in Dade County Florida of first degree murder with a pistol. That conviction was affirmed on appeal.

The Immigration and Naturalization Service (INS) instituted deportation proceedings against the petitioner on June 17,

1991 and served her with an Order to Show Cause. The INS contended that she was deportable under section 241(a)(2)(C) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1251(a)(2)(C), which was amended in 1990 to state, among other things, that any alien who is convicted of using a "firearm" is deportable. The Immigration Judge concluded that the petitioner's Florida conviction was not such a firearms offense and that in any case the 1990 amendment to the statute did not apply retroactively to her 1983 conviction. Consequently the judge terminated the proceedings. The Board of Immigration Appeals reversed the Immigration Judge's finding in both respects and found the petitioner to be deportable. The petitioner challenges the Board's ruling regarding both the retroactivity of the statute and the characterization of her conviction as a firearms offense.

II.

A.

[1] The petitioner's first argument is that section 241(a)(2)(C) of the INA cannot apply retroactively. Our resolution of this issue requires a discussion of the history of this statute. At the time of petitioner's conviction the relevant statute, then section 241(a)(14), allowed for deportation only if the alien was convicted of possessing or carrying an automatic or semi-automatic firearm. 8 U.S.C. § 1251(a)(14) (1983). In 1988 Congress amended this section and broadened its coverage to include convictions for carrying or possessing <u>any</u> firearm (as that term is defined in 18 U.S.C. § 921(a)). At that time Congress provided that the statute would only apply to aliens convicted "on or after the date of enactment of the Act [November 19, 1988]." Congress amended the section again in 1990, at which time it

amplified the coverage of the section to include, among other things, convictions for "using" any firearm. The statute was renumbered as section 241(a)(2)(C). 8 U.S.C. § 1251(a)(2)(C). This was the section under which the petitioner was found deportable.

The petitioner contends that the restriction contained in the 1988 statute continues to apply because the 1988 legislation was the precursor to the 1990 statute. For several reasons we reject petitioner's argument. First the language of the statute makes clear that it applies to aliens convicted "at any time after entry." 8 U.S.C. § 1251(a)(2)(C). Second, Congress explicitly intended this section to apply to aliens "notwithstanding that... the facts, by reason of which the alien [is deportable], occurred before the date of enactment of this Act." Immigration and Nationality Act of 1990 § 602(c).

The Supreme Court previously interpreted similar language in Mulcahey v. Catalanotte, 353 U.S. 692, 77 S.Ct. 1025, 1 L.Ed.2d 1127 (1957). In that case the government was attempting to deport an alien pursuant to section 241(a)(11) and (d) of the INA of 1952, which made aliens deportable if they were convicted of "illicit traffic in narcotic[s]." The permanent resident alien in Mulcahey had been convicted of a narcotics offense in 1925 when there was no applicable statute that would have rendered him deportable. Nevertheless, section 241(a)(11) of the 1952 Act stated that the alien was deportable if convicted "at any time." Section 241(d) further provided that the statute applied "notwithstanding ... that the facts ... occurred prior to the date of Enactment of this Act." Id. at 694, 77 S.Ct. at 1027. After considering that language, the Court concluded that it was "indisputable ... that Congress

was legislating retrospectively", and ruled that the 1925 conviction would render the alien deportable. Id. Similarly in this case we believe that by the use of the same language Congress was again legislating retroactively.[1]

Finally, although Congress easily could have adopted the effective date restriction from the 1988 statute or limited the applicability of this newly-amended section to

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[1]Petitioner notes the above language, that the section applies "notwithstanding that ... the facts [which make the alien deportable] occurred before the date of enactment of the Act." She argues, however, that the term "facts" does not include "convictions." She notes that Congress used the term conviction in the preceding sentence in the legislation- if it had wished to make the statute apply if the "conviction" occurred before the date of enactment, it would have said conviction and not "facts." This argument is untenable. According to the statute itself the only "fact" that could possibly render an alien deportable under section 241(a)(2)(C) is a conviction. If the term fact does not include conviction then it is a meaningless term. We will not interpret legislation to be devoid of all meaning.

convictions occurring after its date of enactment, it did not do so. The only restriction regarding the effective date of section 241(a)(2)(C) is that it will not apply to deportation proceedings for which the alien receives notice prior to March 1, 1991. See Immigration and Nationality Act of 1990 § 602(d). For these reasons, we conclude that section 241(a)(2)(c) displaces the old section 241(a)(14) and the effective date restrictions found in the old statute no longer apply.[2]

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[2]The Fifth Circuit recently examined this precise retroactivity issue in Chow v. INS, 12 F.3d 34 (5th Cir.1993). In that case Chow had been convicted of a firearms offense in 1977. In July 1992, the government commenced deportation proceedings against him pursuant to section 241(a)(2)(C). Chow advanced the same argument that the petitioner makes in this case-that because the 1988 statute was the precursor to the 1990 statute, the 1988 restrictions must apply. The Fifth Circuit noted that section 241(a)(2)(C) applies to aliens convicted "at any time after entry" and also that Congress made no mention of the 1988 effective date restrictions; rather, the only limitation was that the new statute would not apply to aliens who receive notice after March 1, 1991. Consequently they held that section

Therefore, because the petitioner received notice of the deportation proceedings on June 17, 1991 (after March 1, 1991), the statute by its own unmistakable terms applies to her.

B.

[2] As we mentioned above, pursuant to section 241(a)(2)(C) of the INA any alien who is convicted of using a firearm in violation of any law is deportable. The petitioner was charged with and convicted of "first degree murder with a pistol" pursuant to Florida Statutes sections 782.04 and 775.087. The first statute, section 782.04 proscribes the offense of first degree murder. It does not limit itself to offenses involving firearms. The second section, however, reclassifies various felonies when a firearm is involved.

241(a)(2)(C) "completely supersede[d] all former versions of legislation dealing with deportation for firearms offenses" and applied it to Chow's 1977 conviction. Chow, 12 F.3d at 37.

It reads in relevant part:

(1) Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and during the commission of such felony the defendant carries, displays, uses, threatens, or attempts to use any weapon or firearm ... the felony for which the person is charged shall be reclassified as follows:

(a) In the case of a felony of the first degree, to a life felony ...

(2)(a) Any person who is convicted of:

1. Any murder, sexual battery, robbery, burglary, arson ...

who had in his possession a "firearm" as defined in § 790.001(6) ... shall be sentenced to a minimum term of imprisonment of 3 calendar years.

Fla. Stat. § 775.087

The petitioner contends that this section

does not constitute a part of the substantive offense, rather it merely enhances the applicable sentence, i.e. it is relevant only to sentencing. Therefore, she argues, she was not convicted of a firearms offense, but an offense whose sentence was merely enhanced because she used a firearm.[3] The Florida

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[3]By making this argument, petitioner attempts to analogize her case to the Board of Immigration Appeals ruling in In Re Rodriguez-Cortes, Interim Decision 3189 (BIA 1992). In Rodriguez, the alien was convicted of attempted murder under a California statute. A California firearm sentence enhancement statute provided that a defendant's sentence will be enhanced by one year if any principal in the crime used a firearm. Cal.Penal Code § 12022(a). The alien's sentence was increased by one year because one of her codefendants carried a firearm during the commission of the offense. The Board concluded that this statute did not create a separate offense but merely imposed additional punishment; therefore, it did not make the crime a firearms offense. The statute in Rodriguez is wholly distinguishable from the Florida statutes in this case for three reasons. First, the Florida statute did not, and could not, serve to enhance the petitioner's sentence. Section 775.087 upgrades one level and provides a minimum sentence of three years if the defendant used a firearm. The petitioner's principal offense in this case, however, was already a capital

courts have rejected that interpretation of section 775.087. For example one Florida court has held that attempted first-degree murder "becomes the enhanced **offense** of attempted first degree murder with a firearm under section 775.087." Burgess v. State, 524 So.2d 1132, 1134 (Fla. Dist. Ct. App. 1988) (emphasis added). The statute enhances and reclassifies the entire offense, not merely the sentence. Moreover Florida courts have consistently held that conviction for commission of a felony with a firearm (e.g., murder with a pistol) under section 775.087

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felony - the highest level under Florida law - and she was already subject to a minimum sentence of 25 years. Fla.Stat. § 775.082. Second, under Florida law application of the statute results in a firearms offense becoming a lesser included offense in the principal conviction; the same is not true under the California statute. See discussion infra. Finally, Florida law requires a jury finding that the defendant actually possessed the firearm. No such finding is required under the California statute.
See discussion infra.

includes the lesser offense of use or possession of a firearm during the commission of a felony, see Bradshaw v. State, 528 So.2d at 1134, and the principle of double jeopardy precludes a defendant from being convicted of both crimes. Futrell v. State, 627 So.2d 26 (Fla. Dist.Ct.App.1993). If double jeopardy prohibits a conviction for a second firearms offense, the first conviction must necessarily be for firearms offense as well.

Furthermore, before section 775.087 will apply, the State must present "evidence establishing that the defendant had personal possession of the [firearm] during the commission of the felony," State v. Rodriquez, 602 So.2d 1270, 1272 (Fla.1992), and the "jury must make a finding that the defendant committed the crime while using a firearm." State v. Overfelt, 457 So.2d 1385, 1387 (Fla.1984). Therefore, this is not a statute that relates only to sentencing but one that

affects the very nature of the offense from the beginning of the trial through sentencing. For these reasons we conclude that petitioner's 1983 conviction was indeed a conviction for a firearms offense as that term is used in section 241(a)(2)(C), and pursuant to that section she is deportable.

III.

For the foregoing reasons the decision of the Board of Immigration Appeals is AFFIRMED.

APPENDIX B -- JUNE 1, 1993 -- DECISION OF THE BOARD OF IMMIGRATION APPEALS SUSTAINING INS APPEAL AND REVERSING THE IMMIGRATION JUDGE

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
FALLS CHURCH, VIRGINIA

File: A18 760 938 -- Indiantown

In re: ADA ANISIA LOPEZ-AMARO a.k.a. Pantaleon

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Manfred Rosenow, Esquire
Mario M. Lovo, Esquire
2425 Coral Way
Miami, Florida 33145

ON BEHALF OF SERVICE: Kenneth S. Hurewitz, General Attorney

CHARGE:

Order: Sec. 241(a)(2)(C), I&N Act [8 U.S.C. § 1251(a)(2)(C)] - Convicted of firearm violation

APPLICATION: Termination

In a decision dated December 7, 1992, the immigration judge terminated proceedings which had been instituted against the respondent

based on a charge of deportability under section 241(a)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2)(C), conviction of a firearm violation. The Immigration and Naturalization Service has appealed. The appeal will be sustained. The Service request for oral argument before this Board was withdrawn by Appellate Counsel for the Service.

The respondent is a female native and citizen of Cuba who was paroled into the United States in 1972, and whose status was adjusted to that of a lawful permanent resident on May 14, 1977. According to the Judgment contained in the record of proceedings, on December 8, 1983, the respondent was convicted in the Circuit Court, Eleventh Judicial Circuit in and for Dade County, Florida, for first degree murder with a firearm (pistol) in violation of sections 782.04 and 775.087 of the Florida Statutes. On

July 31, 1991, the Immigration and Naturalization Service instituted proceedings by filing an Order to Show Cause with the Office of the Immigration Judge. The Order charges the respondent with deportability under section 241(a)(2)(C) of the Act, conviction of a firearms violation.[1]

The immigration judge found that section 241(a)(2)(C) could not be applied "retroactively" to cover the respondent's 1983 conviction. We recently decided this issue contrary to the position taken by the immigration judge. Matter of Chow, Interim Decision _____ (No. A18 998 312, BIA April 13, 1993). Section 241(a)(2)(C) is a proper charge. The respondent was notified of these

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[1]DeportabilIty based in conviction for a crime involving moral turpitude is not at issue in this case because the murder took place more tha 5 years after the respondent's last entry into this country. See, 241(a)(2)(A)(i)(I) of the Act.

proceedings [sic, underscored] by an Order to Show Cause issued and served after March 1, 1991. The 1990 revised deportation provisions therefore apply. See section 602(d) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5082 (November 29, 1990). The plain language of section 241(a)(2)(C) applies to convictions "at any time after entry." Section 241(a)(2)(C) thus supersedes any prior versions of the firearms deportation ground for any deportation proceedings for which the respondenT received notice after March 1, 1991. Matter of Chow, supra.

Alternatively, the immigration judge held that the respondent had not been convicted of a firearms offense. In reaching this conclusion the immigration judge relied in part on Matter of Rodriguez-Cortes, Interim Decision 3189 (BIA 1992), in which the respondent's punishment for the first of her five counts of attempted murder in the second

degree was enhanced by 1 year based on the use of a firearm in the commission of the crime. The Board in Rodriguez-Cortes held that the firearms enhancement was not a firearms conviction for purposes of section 241(a)(2)(C). The immigration judge in the present case found Rodriguez-Cortes analogous, noting that section 775.087 is also a firearm enhancement provision.

Rodriguez-Cortes addresses only one enhancement provision and only one of the numerous ways enhancement statutes are used in the federal and state criminal systems. The enhancement provision as described in Rodriguez-Cortes functioned in a limited fashion. It did not create a separate offense or conviction under California law. It did not merge with the respondent's conviction or become a lesser included offense of the murder conviction. People v. Wolcott, 655 P.2d 520 (Fla. 1983) It simply added one year to the

defendant's sentence as, on its face, it is designed to do. In truth, however, enhancement statutes and their uses vary widely and often become part of a defendant's substantive offense. For example, 18 U.S.C. § 924(c)(1), which is widely characterized as a firearms enhancement provision, is commonly treated as a substantive offense for which a person can be found guilty and sentenced. See United States v. Hill, 971 F.2d 1461 (10th Cir. 1992); Matter of Carillo, 16 I&N Dec. 625 (BIA 1978). This is not to mention the variety of enhancement statutes and uses within and among the states. As the facts in the present case illustrate, there is no magic in the word "enhancement"; rather, the use and effect of the enhancement statute in a particular case must be examined. The fact that the firearms element in a conviction record originated from an "enhancement" statute cannot function as a bright-line test exculpating an alien from

section 241(a)(2)(C).

The firearms statute in the instant case is an "enhancement statute." Section 775.087 of the Florida Statutes provides, in the pertinent part, that:

> (1) Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and during the commission of such felony the defendant carries, displays, uses, threatens, or attempts to use any weapon or firearm... the felony for which the person is charged shall be reclassified as follows:
>
> (a) in the case of a felony of the first degree, to a life felony
>
> (b) In the case of a felony of the second degree, to a felony of the first degree

(c) In the case of a felony of the third degree to a felony of the second degree

(2)(a) Any person who is convicted of:

1. Any murder, sexual battery, robbery, burglary, arson, aggravated assault, aggravated battery, kidnapping...

who had in his possession a "firearm" as defined in § 790.001(6), or "destructive device," as defined in § 790.001(4), shall be sentenced to a minimum term of imprisonment of 3 calendar years... Notwithstanding the provision of § 948.001, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall the defendant be eligible for parole or statutory gain-time

under § 944.725, prior to serving such minimum sentence.

Similar to the firearm enhancement provision at issue in Rodriguez-Cortes, section 775.087 on its face operates to raise the penalty when a felony, including certain named crimes, is committed with the use of a weapon or firearm. It does so by upgrading the felony classification (and therefore the increased punishment that goes with it), or by imposing a minimum 3-year mandatory sentence without the option of suspension, deferment, or withholding of adjudication of guilt or imposition of a sentence, and without eligibility for parole or gain time prior to the 3 years. Also similar to the provision in Rodriguez-Cortes, section 775.087, by its very terms, cannot apply to any "felony in which the use of a weapon or firearm is an essential element." However, despite this similarity,

the application of section 775.087 in this case results in an outcome quite different than that in Rodriguez-Cortes.

The respondent was convicted of first degree murder under section 782.04.[2] First degree murder is a "capital" felony punishable by death or life in prison with a minimum mandatory 25 years prior to eligibility for parole.[3] The respondent was sentenced to life

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[2]Section 782.04 of the Florida Statutes defines murder as:

> The unlawful killing of a human being: (1) When perpetrated from a premeditated design to effect the death of the person killed or any human being... is murder in the first degree and constitutes a capital felony, punishable as provided in § 775.082.

[3]Section 775.082 of the Florida Statutes referred to in section 782.04 states in part that:

> (1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole unless the

proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

(2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or by the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).

(3) A person who has been convicted of any other designated felony may be punished as follows:

> (a) For a life felony committed prior to October 1, 1983, by a term of years not less than 30 and, for a life felony committed on or after October 1, 1983, by a term of imprisonment for life or by a term of imprisonment not exceeding 40 years;
>
> (b) For a felony of the first degree, by a term of

imprisonment with 25 years without parole as a mandatory minimum. So how was the penalty increased by proof of section 775.087 in this case? It was not. A "capital" felony is a higher classification that a "life" felony. See, footnote 3., supra. You can not [sic] reclassify a capital felony to something higher and, indeed, section 775.087 does not even mention capital felonies. Moreover, the 3-year mandatory requirement of section 775.087 is obviously no increase to the

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> imprisonment not exceeding 30 years or when specifically provided by statute, by imprisonment for a term of years not exceeding life imprisonment;
>
> (c) For a felony of the second degree, by a term of imprisonment not exceeding 15 years;
>
> (d) For a felony of the third degree, by a term of imprisonment not exceeding 5 years.

respondent's already-imposed 25 year minimum mandatory.

So is the inclusion of section 775.087 in the respondent's case mere surplusage?[4] No. Rather, section 775.087 was used to enhance not the penalty but the characterization of the respondent's offense itself. Under Florida law, use of a firearm is not an essential element of the crime of murder. Strickland v. State, 437 So.2d 150 (Fla. 1983). However, murder becomes the enhanced offense of "murder with a firearm" if section 775.087 is charged in the information and is satisfied. Burgess v. State, 524 So.2d 1132 (Fla. Dist. Ct. App. 1983). In other words, if the elements of murder under section 782.04 and the elements of use of a firearm during the commission of a felony under section 775.087 are charged and

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[4] Cf. Matter of Perez-Cortes, Interim Decision 3194, at 5 & n. 4 (BIA 1992).

proven, the defendant is considered to have been convicted of "murder with a firearm" under Florida law. Id. In fact, a defendant convicted as such can not be separately charged and convicted of "use of a firearm during the commission of a felony" pursuant to section 790.07(2) of the Florida Statutes because that would violate double jeopardy. Id. In these circumstances, where the firearms element has become an element of the respondent's substantive offense, the fact that the firearms element of the respondent's conviction came from an "enhancement" statute is irrelevant.

Given that there is no question that the respondent has been convicted for immigration purposes, see Matter of Ozkok, 19 I&N Dec., 546 (BIA 1988), and that use of a firearm is deemed to be an element or lesser included offense of her conviction, the relevant question is whether the conviction is properly

termed a conviction for a firearms offense within the meaning of section 241(a)(2)(C). While use of a firearm is deemed to be an element of the respondent's offense, does that make the offense a firearms offense, or is it murder only (a crime involving moral turpitude), or is it both? This is the issue addressed by the concurrence in Matter of Montenegro, Interim Decision 3192 (BIA 1992).

We find that a conviction such as that in the present case, where the firearms violation is deemed to be an element or lesser included offense of the conviction, is properly considered both a crime of moral turpitude and a firearms conviction under section 241(a)(2)(C) of the Act. There is no doubt that murder is a crime of moral turpitude regardless of whether it was committed with a firearm. That it was committed with a firearm however, and that use of the firearm is deemed to be an element or a lesser included offense

of the offense, also makes it a firearms violation under section 241(a)(2)(C). The amendment of the firearms deportation ground to include "use" violations indicates more than "regulatory" violations as suggested in the concurrence in Montenegro, supra, at 8. An alien convicted of "use of a firearm" would be deportable under section 241(a)(2)(C). An alien who used the firearm to kill a person as was convicted of "murder" and "use of a firearm" would also be deportable under section 241(a)(2)(C). It would be incongruous to hold that an alien who used the firearm to kill a person and was convicted of "murder with the use of a firearm," where the use of the firearm was specifically deemed to be a lesser included offense, was not deportable under section 241(a)(2)(C). That is the case here. We find the respondent deportable as charged. The appeal will be sustained. The respondent does not appear eligible for relief

from deportation. Accordingly, the following orders are entered.

ORDER: The appeal is sustained.

FURTHER ORDER: The respondent shall be deported from the United States to Cuba.

FOR THE BOARD (signed) David L. Milhollan

DISSENTING OPINION: Michael J. Heilman, Board Member

I respectfully dissent.

In a very short time, this Board has had to retreat from its confident position in Matter of Rodriguez-Cortes, Interim Decision 3189 (BIA 1992) that individuals who have been convicted of a "firearms" violation were distinguishable from those who had merely had their sentences "enhanced" because they had used a firearm in the course of committing a crime. In this case, the distinction falls into a broken heap. The respondent has been

convicted of murder under section 782.04 of the Florida Statutes. Because the murder was committed with a firearm, he [sic] came within the provisions of section 775.087 of the Florida Statutes, for purposes of sentencing.

The Florida courts that interpret Florida criminal statutes seem to be under the impression that the purpose of section 775.087 is to categorize or classify the offense of murder by its level of severity for purposes of punishment. In a decision involving the same Florida statutes at issue here, a Florida court held:

> Attempted first-degree murder under Sections 782.04 and 777.04, Florida Statutes, becomes the enhanced offense of attempted first-degree murder with a firearm under Section 775.087, Florida Statutes, which provides:
>
> (1) Unless otherwise provided by

> law, whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and during the commission of such felony the defendant carries, displays, uses, threatens, or attempts to use any weapon or firearm, or during the commission of such felony the defendant commits an aggravated battery, the felony for which the person is charged shall be reclassified as follows:
>
> (a) in the case of a felony of the first degree, to a life felony.

Burgess v. State, 524 So.2d 1132, 1133 (Fla. App. 1988).

If indeed we are construing the language of section 775.087, then it is not at all clear to me why we would ignore the fact that a person will fall within this statute's

purview if the person has used "any weapon or firearm," or "commits an aggravated battery." To call this provision a statute aimed at firearms would be a gross exaggeration. It is evident that an individual need not use a firearm to be punished under this provision.

If we are actually applying the firearms deportation ground provided for in the immigration law, then we are supposed to be deciding if the respondent here is:

Any alien who at any time after entry is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying un violation of any law, any weapon part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18, United States Code)...

Section 241(a)(2)(C), Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2)(C).

The only word in this provision that

appears to be relevant to the respondent's case is the word "using", as the Florida sentencing statute heightens the punishment for one who "uses" or "attempts to use" a firearm in the course of a felony. But unlike the majority, I do not find that simply because the same word is used in the immigration law and the Florida statute. the word makes the statute into a firearms offense. If this is so, the statute is also a "weapons" offense and an "aggravated battery" offense, because both of those terms are also in the Florida statute.

In my estimation, the fallacy of the Board's interpretation lies in its persistent belief that if it discovers the word "firearm" in a statute it has uncovered a firearms offense. If, however, the statute "enhances" a punishment for another felony, then it is not a firearms offense. But of course, an "enhancement" statute may refer to a firearm,

and if it does, it will also become a firearms offense if the reference to firearm is construed as an "element" of the statute. It would be useful to us all, however, if the majority would define what it means by an "element." While the majority uses that term as is it were applying the general legal usage of "element," meaning the parts of a crime that must be proved to sustain a conviction, in actuality, it is interpreting that term in a much broader, more colloquial sense. The use of a firearm is not an "element" of murder in the State of Florida, and the conviction of the respondent would stand even if his [sic] sentencing under section 782.04 was reversed.

The loose usage of the term "element" by the majority can easily result in circular reasoning, as is apparent here. We are told by the Florida murder statute, section 782.04, that the use of a firearm is not an essential element of the offense of murder. We are

explicitly told by the "enhancement" provision, section 775.087, that an individual may not be sentenced under this latter provision if the underlying felony to which this section is applied has as an "essential element" the use of a firearm. The conclusion is inescapable that the felony offense of murder under Florida law is not an offense defined by the use of a firearm. This being the case, then these two Florida statutes as applied in tandem are no different from the two California statutes this Board construed in Matter of Rodriguez-Cortes, supra.

For these reasons, I would dismiss the appeal.

(Signed) Michael J. Heilman, Board Member

APPENDIX C -- DECEMBER 7, 1992 -- DECISION OF THE IMMIGRATION JUDGE TERMINATING DEPORTATION PROCEEDINGS AGAINST PETITIONER

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
MIAMI, FLORIDA

IN THE MATTER OF: *
*
ADA ANISIA LOPEZ-AMARO * CASE NO. A18 760 938
a/k/a/ PANTALEON, *
RESPONDENT *

IN DEPORTATION PROCEEDINGS AT
MARTIN CORRECTIONAL INSTITUTION
INDIANTOWN, FLORIDA

CHARGE: Section 241(a)(2)(C) of the Immigration and Nationality Act -- firearm or destructive device conviction.

APPLICATIONS: Termination of Proceedings

For respondent:

Manfred Rosenow, Esq.
2425 Coral Way
Miami, Florida 33145

For the Service:

Kenneth S. Hurewitz
U.S. Immigration and
Naturalization Service
7880 Biscayne Boulevard
Miami, Florida 33138

DECISION OF THE IMMIGRATION JUDGE

Respondent ADA ANISIA LOPEZ-AMARO, also known as PANTALEON, is an adult female native and citizen of Cuba, paroled into the United

States as a refugee in 1972. In 1977, she was adjusted to lawful permanent resident status as of May 14, 1972. More than five years later, Respondent was convicted of murder and is presently incarcerated.

An Order to Show Cause (hereafter OSC) was issued by the Immigration and Naturalization Service (hereafter Service) on June 17, 1991 [Exhibit 1]. The Service claims Respondent is deportable under §241(a)(2)(C) of the Immigration and Nationality Act (the Act) for having been convicted of murder with a pistol, The Service contends that the conviction is a firearms offense.

Respondent disagrees and contends that she is not deportable for having been convicted of a firearm offense described in Section 241(a)(2)(C).

On March 16, 1992, Respondent appeared with counsel and admitted that she is a native and citizen of Cuba who was paroled into the

United States in 1972 and adjusted to legal permanent resident status in 1977, which was rolled back to an effective date of May 14, 1972.

Respondent denies deportability and maintains that she was not convicted of a firearms offense; that §241(a)(2)(C) does not apply to convictions prior to November, 1988; and that if deportable, she should be eligible for relief. The Service offered the record of conviction into evidence [Exhibit 2].

In response to Respondent's oral Motion to Terminate Proceedings, the Court directed the attorneys to submit briefs covering (1) the retroactivity of the statutory provision; (2) whether this was a firearms offense; and (3) relief possible.

Firearms Conviction?

Section 241(a)(2)(C) of the Act, entitled "Certain firearm offenses," provides:

Any alien who at any time after

> entry is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying in violation of any law, any weapon, part, or accessory which is a firearm or destructive device ... is deportable.

To determine whether Respondent was convicted of a firearms offense, the Court engages in statutory interpretation, closely examining the Florida criminal provision. The statutorily-defined elements of a crime often determine whether a person has been convicted of a violation of law that would render him or her deportable under §241(a)(2)(C). See Matter of Short, Int. Dec. 3125 (BIA 1989). The Court must also examine the charging information or indictment, as well as the final judgment or conviction record. Simply put, if the person can be convicted of the crime without using, carrying, or possessing a firearm or destructive device, then use of a firearm is **not** an essential element of the crime, so the

person would not be deportable under §241(a)(2)(C).

The Court has also utilized a recent precedent decision by the Board of Immigration Appeals to reach a decision. See Matter or Rodriguez-Cortes, Int. Dec. 3189 (BIA 1992).

Respondent was convicted in the Circuit Court of Dade County, Florida of first degree murder in violation of Florida Statutes 782.04 and 775.087. But, as discussed below, Section 775.087 is a sentencing provision which does not create a separate offense.

Florida Statute 782.04 defines murder:

> (1)(a) The unlawful killing of a human being: (1) When Perpetrated from a premeditated design to effect the death of the person killed or any human being ... is murder in the first degree and constitutes a capital felony, punishable as Provided in §775.082.

The statute does not include use or possession of a weapon among the essential elements of the defined crime. A person could

be convicted of murder by pistol, knife, poison, or hand. The use of a firearm is not an essential element of the crime of murder, so conviction under this statute cannot constitute conviction of a firearms offense.

The other Florida statute under which Respondent was convicted, §775.087, is found in Chapter 775, entitled "Definitions; General Penalties; Registration of Criminals." This section allows reclassification of sentences in certain circumstances:

> Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and during the commission of such felony the defendant carries, displays, uses, threatens, or attempts to use any weapon or firearm, or during the commission of such felony the defendant commits an aggravated battery, the felony for which the person is charged shall be reclassified.

This section, by its own plain language exempting felonies in which use of a weapon or

firearm is an essential element, limits its application to felonies in which use of a weapon or firearm is not an essential element. The statute is a provision to allow enhanced or more severe sentencing where a weapon is utilized during commission of a crime, but does not create a separate criminal offense for which a defendant can be punished; clearly a defendant cannot be sentenced under this provision unless he has been convicted of a criminal offense under a different section of Florida law.

It is noted in passing that neither of the two statutes analyzed above is found in the chapter of the Florida Statutes which covers crimes involving weapons and firearms, Chapter 790.

The Court concludes that Respondent was not convicted of a firearms offense and thus is not deportable as charged.

Retroactivity

Respondent's conviction occurred in 1983. The Service contends that §241(A)(2)(C) was added to the Act in 1990 and applies to all Orders to Show Cause issued after March 1, 1991, and all conduct committed prior to that date.

Prior to 1988, the deportability subsection dealing with weapons specified that the weapon must have been either machine guns or sawed-off shotguns. As part of the Anti-Drug Abuse Act of 1988 (hereafter ADAA), the subsection was amended to expand the class of weapons to include "any firearm or destructive device (as defined in paragraphs 3 and 4, respectively, of section 921(a) of Title 18, United States Code), or any revolver." For the expanded definition of "firearm" rather than machine gun or sawed-off shotgun to apply, the alien must have been convicted on or after the date of the enactment of the ADAA, November 18, 1988.

Section 241(a)(2)(C) was amended in 1990 to expand the definition of qualifying offenses from "possessing or carrying in violation of any law" to "purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying in violation of any law." This provision, though expanding the offenses to which the section may be applied, adds another restriction to the circumstances under which an alien can be charged with a firearms violation. Charges under these amended grounds cannot be brought unless the OSC was served upon Respondent on or after March 1, 1991, Clearly, Respondent can now be charged with deportability under the currently numbered statutes. See Matter of Papazyan, Int. Dec 3186 (BIA 1992).

The 1990 amendment did not affect the definition of "firearm" or its limited application to convictions which occur after November 18, 1988. It simply added to the list

of uses of that firearm which may be penalized. An alien can be found deportable for a conviction involving possession or carrying of a firearm that occurred after November 18, 1988; or a conviction involving purchasing, selling, offering for sale, etc., a firearm that occurred after November 18, 1988, and for which an OSC was issued after March 1, 1991.

The Service relies upon the "savings" provision in the Immigration Act of 1990, §602(c), to support its argument. That provision makes the "amendments," i.e., the changes in types of conduct related to weapons, apply when an OSC is served on a Respondent after March 1, 1991. However, although the 1990 statute does apply, even where a Respondent engaged in the deportable conduct years earlier, the conduct must have subjected Respondent to deportability at the time that the conduct took place. Respondent

was not deportable at the time of her conviction, so the Service's argument fails.

Because of these conclusions, the Court will grant Respondent's Motion to Terminate. The Court will not consider Respondent's eligibility to apply for relief from deportation as there is no need to explore this.

ORDER

IT IS ORDERED that these deportation proceedings are TERMINATED.

SIGNED this 7th day of December, 1992.

ANNIE. S. GARCY
IMMIGRATION JUDGE

APPENDIX D -- MAY 14, 1972

PETITIONER'S ALIEN REGISTRATION CARD
SHOWING EFFECTIVE DATE OF ADMISSION
TO LAWFUL PERMANENT RESIDENT STATUS

18760938 11 93 821 322 49423

5822 34113 42424 27316 32975

051472 534 005 12120 4269389

No. 94-671

In the Supreme Court of the United States

OCTOBER TERM, 1994

ADA ANISIA LOPEZ-AMARO, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under Section 241(a)(2)(C) of the Immigration and Nationality Act, as amended in 1990, an alien is deportable if he has been convicted of illegal use of a firearm "at any time after entry." 8 U.S.C. 1251(a)(2)(C) (Supp. V 1993). That amendment applies even when "the facts * * * occurred before the date of the enactment of [the 1990] Act." Immigration Act of 1990, Pub. L. No. 101-649, § 602(c), 104 Stat. 5081-5082 (1990). The question presented is whether the 1990 amendment to Section 241(a)(2)(C) applies to convictions prior to the date of its enactment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. Ai-Axiv) is reported at 25 F.3d 986.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1994. The petition for a writ of certiorari was filed on October 11, 1994 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a citizen of Cuba. She was paroled into this country in 1972 and became a lawful permanent resident in 1977. In 1983, petitioner was convicted of first degree murder with a pistol, and that conviction was affirmed on appeal. In 1991, the Immigration and Naturalization Service instituted deportation proceedings against petitioner under Section 241(a)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2)(C) (Supp. V 1993), which was amended in 1990 to provide that any alien convicted of a firearm offense is deportable. Pet. App. Aii-Aiii.

An immigration judge concluded that the Florida conviction was not a firearm offense and that, in any event, the 1990 amendment to Section 241(a)(2)(C) did not apply to petitioner because her 1983 conviction occurred prior to the amendment. Pet. App. Aiii; see Pet. App. Ci-Cxi. The Board of Immigration Appeals reversed. It held that petitioner's Florida conviction was a firearms offense and that the amendment to Section 241(a)(2)(C) applied retroactively to petitioner's conviction. Pet. App. Bi-Bxxi.

2. The court of appeals affirmed, Pet. App. Ai-Axiv, holding that Section 241(a)(2)(C) applies to aliens who were convicted prior to the 1990 amendment to that Section. *Id.* at Av. In reaching that conclusion, the court relied (*ibid.*) on the language of Section 241(a)(2)(C) making it applicable to aliens convicted "at any time after entry." 8 U.S.C. 1251(a)(2)(C) (Supp. V 1993). The court also relied (Pet. App. Av) on the separate provision in the 1990 Act stating that the Section, as amended, would apply "notwithstanding that * * * the facts, by reason of which an alien [is deportable], occurred before the date of the enactment of

this Act." Immigration Act of 1990, Pub. L. No. 101-649, § 602(c), 104 Stat. 5081-5082 (1990). The court noted that in *Mulcahey* v. *Catalanotte*, 353 U.S. 692 (1957), this Court had interpreted similar language as "indisputable" evidence that Congress was legislating retrospectively. Pet. App. Avi-Avii. The court therefore concluded that "by the use of the same language Congress was again legislating retroactively." *Id.* at Avii.

ARGUMENT

In 1990, Congress amended Section 241(a)(2)(C) of the Immigration and Nationality Act to make a conviction for illegal use of a firearm a ground for deportation. See 8 U.S.C. 1251(a)(2)(C) (Supp. V 1993). Petitioner contends that the amendment does not apply to convictions that occurred prior to its effective date. That contention is foreclosed by this Court's decision in *Mulcahey* v. *Catalanotte*, 353 U.S. 692 (1957).

In *Catalanotte*, an alien had been convicted of a drug trafficking offense in 1925. 352 U.S. at 692. In 1952, Congress made the conviction of such an offense a ground for deportation, and in 1953, the alien was ordered deported pursuant to that provision of the 1952 Act. The Court rejected the alien's contention that he was not subject to deportation because his drug trafficking conviction was not a ground for deportation at the time of the conviction. The Court noted that "[§] 241(a)(11) makes an alien deportable if he has 'at any time' been convicted of illicit traffic in narcotic drugs," and that "§ 241(d) makes § 241(a)(11) applicable to all aliens covered thereby 'notwithstanding * * * that the facts * * * occurred prior to the date of enactment of this Act.'" *Id.* at 694. The Court concluded that those Sections "specifically provide for the deportation of an alien notwithstanding that the offense for which he is

being deported occurred prior to the 1952 Act." *Ibid.* In light of the clear statutory text, the Court deemed it "indisputable" that "Congress was legislating retrospectively, as it may do, to cover offenses of the kind here involved." *Ibid.*

The statutory language at issue here is indistinguishable from the language at issue in *Catalanotte*. The Immigration Act of 1990 renders an alien deportable if he has "at any time" been convicted of a firearms offense. 8 U.S.C. 1251(a)(2)(C) (Supp. V 1993). The 1990 Act further provides that that ground for deportation is applicable "notwithstanding that * * * the facts * * * occurred before the date of the enactment of this Act." Pub. L. No. 101-649, § 602(c), 104 Stat. 5081-5082 (1990). Thus, as the court of appeals concluded, by using the same language that had been interpreted in *Catalanotte* to require retrospective application, "Congress was again legislating retroactively." Pet. App. Avii-Aviii.

The Fifth and Ninth Circuits are the only other courts of appeals that have addressed the question presented here. Both of those courts have similarly held that Section 241(a)(2)(C) applies to firearms convictions that occurred prior to the date of its amendment in 1990. See *Kin Sang Chow* v. *INS.*, 12 F.3d 34, 37 (5th Cir. 1993); *United States* v. *Yacoubian*, 24 F.3d 1, 6-7 (9th Cir. 1994).

Petitioner contends (Pet. 25-26) that to construe the amendment to Section 241(a)(2)(C) to apply to convictions entered prior to its enactment is inconsistent with *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483 (1994), and *Rivers* v. *Roadway Express, Inc.*, 114 S. Ct. 1510 (1994). There is, however, no such inconsistency. In *Landgraf*, the Court reaffirmed that an Act of Congress should not be interpreted to apply retroactively "absent clear congressional intent favoring such a result." 114

S. Ct. at 1505. Applying that canon of construction, the Court held in *Landgraf* and *Rivers* that certain sections of the Civil Rights Act of 1991 did not apply to cases pending on the date of enactment because there was no evidence that Congress clearly intended for those sections to apply retroactively. *Landgraf*, 114 S. Ct. at 1505-1508; *Rivers*, 114 S. Ct. at 1515-1517.

The situation here is very different. As discussed above, the text of the 1990 Act shows that Congress clearly intended for the amendment to Section 241(a)(2)(C) to apply retroactively, and this Court previously construed essentially identical language to have retrospective effect in *Catalanotte*. The decision below, construing Section 241(a)(2)(C) to have retroactive application, is therefore fully consistent with *Landgraf* and *Rivers*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorneys

JANUARY 1995